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No. 993

IN THE

Supreme Court of the United States

October Term, 1957

PAUL E. MOORE AND VIOLA H. MOORE, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 12-26) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1958 (Pet. 26-27) and a petition for rehearing was denied on April 14, 1958 (Pet. 27). The petition for a writ of certiorari was filed on May 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the trial court erred in refusing to give a requested instruction that "established reputation for good character" might "alone create a reasonable doubt, although, without it, other evidence would be convincing."

2. Whether the trial court erred in explaining the concept of reasonable doubt to the jury.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145 (b).)

STATEMENT

In December, 1955, petitioners, husband and wife, were charged in a three-count indictment filed in the Western District of Texas with having willfully attempted to evade and defeat their individual income taxes for the years 1950, 1951 and 1952, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 2-4.) The indictment alleged that the amounts of net income and income tax declared by petitioners on their (joint) returns compared with the true amounts as follows (R. 2-4):

	Net Income		Income Tax	
Year	Reported	Corrected	Reported	Corrected
1950	$ 8,982.53	$23,886.69	$1,453.28	$ 5,701.86
1951	7,188.80	24,900.17	1,328.68	6,835.08
1952	8,202.55	25,419.92	1,380.62	7,697.56
Totals	$24,673.88	$74,206.78	$4,162.58	$20,234.50

After a jury trial, petitioners were found guilty on all three counts. (R. 456.) On July 17, 1957, the court imposed a fine of $1,500 on Mrs. Moore "on all counts generally" and a prison sentence of one year. The prison sentence was suspended and she was placed on probation for three years. (R. 460.) Mr. Moore was fined $2,500 on each count, and sentenced to consecutive one-year prison terms on each count. The prison sentences with respect to counts 2 and 3 were suspended and Moore was placed on probation for three years, to begin upon completion of service of the sentence imposed on count 1. (R. 460-461.)

The evidence to support the verdict, the sufficiency

of which is not challenged, may be summarized briefly as follows:

During the prosecution years, petitioner Paul Moore owned and operated an automobile agency in Freeport, Texas, engaging in the purchase and sale of new and used cars. (R. 171, 315.) Although the business included a service department, most of the profit came from the sale of new cars. (R. 338-339.) Mr. Moore worked mainly on the buying and selling of cars, and his wife worked in the office. Both wrote checks on the business bank account. (R. 164-165.) The business maintained the standard accounting system prescribed by the General Motors Corporation for its dealers, and it filed monthly financial statements as required by that Corporation. (R. 69, 77, 138-139, 254.) These monthly statements were in agreement with petitioners' books. (R. 86-87.) The investigating agents made test checks to ascertain the reliability of the books, and they found that every item examined was properly entered from the original sources of information and properly carried to the ledger. (R. 87.)

The Government established by direct evidence the precise amount of unreported income alleged in the indictment with respect to each year. The differences between the income and expense as shown on the books (and monthly financial statements) and the amounts shown on the income tax returns are as follows (R. 87-94, 201-209):

	1950	1951	1952
Sales understated		$ 6,000.00	
Miscellaneous income understated	$ 703.44	1,079.28	$ 1,144.51
Cost of sales overstated	8,124.25		5,000.00
Operating expenses overstated[1]	6,078.41	10,500.00	11,161.47
Unreported adjusted gross income	$14,906.10	17,579.28	17,305.98
Less: Standard deduction understated	1.94	167.91	88.61
Unreported net income	$14,904.16	$17,411.37	$17,217.37

There was also direct evidence of petitioners' willfulness. One Vetterling, who had kept petitioners' books and prepared their 1950 tax return, testified that he had originally prepared a return from the books; that petitioners came to his home in January, 1951, for the purpose of signing it; that petitioner Paul Moore "didn't like the amount of tax" shown on the return, which was "considerably more than the return that was finally sent in" (R. 172-174); that he told Vetterling he wanted the tax to run between $1,300 and $1,400, and requested Vetterling "to change figures, no matter where, to get the tax down" (R. 174); that "after a terrific argument" (R. 185) Vetterling did so, in the presence of both petitioners (R. 174); that a new return was typed up that same night, which both petitioners then signed (R. 175); that petitioner Paul Moore, in the presence of peti-

[1] The inflated expense figures were spread over various items. (R. 148, 204-209.)

tioner Viola Moore and Mr. and Mrs. Vetterling, then destroyed the return which Vetterling had originally prepared and all work sheets pertaining to it (R. 175-176); that Vetterling warned Mr. Moore that he might be in trouble if he filed the false return, and Moore replied that that "was his worry, not mine, or some words to that effect" (R. 177); that, the following month, Vetterling expressed a desire to terminate his employment with Moore; and that he did do so several months later (R. 177). Vetterling's testimony was corroborated generally by that of Mrs. Vetterling. (R. 190-192.)

Somewhat similar testimony with respect to the petitioners' 1951 and 1952 returns was given by one Danforth, who, like Vetterling, had had formal education in accounting and many years of accounting experience. (R. 134, 170.) Danforth, formerly a brother-in-law of petitioner Paul Moore, testified that he had kept their books, assisted by petitioner Viola Moore, from June, 1951, to June, 1954 (R. 134-136, 138, 164); that he had kept them accurately, based on the information given him by petitioners, and had balanced them every month (R. 139); that he had prepared the 1951 and 1952 tax returns (R. 140, 150); that he had understated income and overstated expenses on the returns because petitioners had told him they "didn't think that the books as posted were correct" (R. 144); that each year he had re-arranged the figures to show the profit petitioners wanted to report, *i.e.*, about the same amount they had reported for the prior year (R. 147, 150-151); that he had made no attempt to verify the statements made to him by petitioners and had

made no adjusting entries on the books (R. 148); that he had known when he prepared the returns that they were not in agreement with the books, and had warned petitioners of this fact (R. 142, 149); and that he "felt that everything [he] did [he] was trying to do it just as they would do it themselves if they would" (R. 151).

The defense offered evidence that petitioners had a good reputation for truth and veracity and a good reputation as law-abiding citizens. Petitioners also took the witness stand. They flatly denied the testimony of Mr. and Mrs. Vetterling and claimed that they had relied in good faith upon both Vetterling and Danforth to prepare proper income tax returns. (R. 263-272, 278-284, 317-328.)

The trial judge refused to give the following requested instruction on character evidence (R. 423):

> You are instructed that good character, when considered in connection with other evidence in this case, may generate a reasonable doubt. The circumstances may be such that established reputation for good character, if it's relevant to the issue, would alone create a reasonable doubt, although, without it, other evidence would be convincing.

The court charged that the testimony as to petitioners' good character was evidence in their favor, and that it (R. 445):

> * * * is competent testimony and that you shall take it and consider it, and give it such weight as appeals to your judgment under your oaths as jurors, and when considered in connection with

all of the testimony in the case, if you are not then satisfied beyond a reasonable doubt of the guilt of the defendants of the charges against them, it is your duty to acquit them.

ARGUMENT

1. There is no merit in the contention (Pet. 6-8) that the trial court erred in refusing to give the requested instruction on character evidence (*supra*, p. 7). That instruction was taken from language in *Edgington* v. *United States*, 164 U. S. 361, 366.[2] But it cannot properly be said, as petitioners assert (Pet. 6), that "the Court of Appeals in this case is in conflict" with *Edgington*. All that this Court said in *Edgington* was that the "circumstances *may be such* that an established reputation for good character * * * would alone create a reasonable doubt * * *" (164 U. S. at 366; emphasis added). This Court has repeatedly refused to review cases in which it has been contended that denial of a request to instruct in the language of *Edgington* required reversal. *Le More* v. *United States*, 253 Fed. 887, 894 (C.A. 5th), certiorari denied, 248 U. S. 586; *Kaufmann* v. *United*

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[2] In *Edgington* this Court stated (164 U.S. at 366):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

States, 282 Fed. 776 (C.A. 3d), certiorari denied, 260 U. S. 735; *Kreiner* v. *United States*, 11 F. 2d 722, 726 (C.A. 2d), certiorari denied, 271 U. S. 688 (construing *Edgington* to mean that the value of evidence of good character is not confined to doubtful or conflicting cases); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 639 (C. A. 2d), certiorari denied, 329 U. S. 742 (concluding that the *Edgington* case holds that the trial court must not tell the jury to consider character evidence only when the scales are already in balance); *Baugh* v. *United States*, 27 F. 2d 257, 261 (C. A. 9th), certiorari denied, 278 U. S. 639 (holding that, in the circumstances presented, to charge a jury in the language of *Edgington* would be "to accentuate and give undue prominence" to character evidence); *Schcib* v. *United States*, 14 F. 2d 75 (C. A. 7th), certiorari denied, 273 U. S. 701; *Haffa* v. *United States*, 36 F. 2d 1 (C. A. 7th), certiorari denied, 281 U. S. 727; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C. A. 8th), certiorari denied, 315 U. S. 800 (holding that, under the circumstances there present, no one could have honestly believed that proof of defendant's reputation, standing alone, could raise a doubt of his guilt); *Poliafico* v. *United States*, 237 F. 2d 97, 114 (C. A. 6th), certiorari denied, 352 U. S. 1025 (holding that under the doctrine of *Edgington* it is proper to charge that character evidence should be considered together with the other evidence in arriving at a verdict). See also *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C. A. 2d), certiorari denied, 285 U. S. 556; *United States* v. *Kelley*, 105 F. 2d 912, 918 (C. A. 2d); *Gariepy* v. *United*

States, 220 F. 2d 252, 261 (C. A. 6th), certiorari denied, 350 U. S. 825; *Grace* v. *United States*, 4 F. 2d 658 (C. A. 5th), certiorari denied, 268 U. S. 702.[3]

It was said in *Michelson* v. *United States*, 335 U. S. 469, 476, that evidence of a reputation for good character "alone, *in some circumstances*, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a *proper* case should be so instructed." (Emphasis added.) We do not construe this as extending the *Edgington* doctrine.[4]

Moreover, we submit that the instant case, in any event, is one peculiarly inappropriate for further review. The charge as given (*supra*, pp. 7-8) left the jury free to acquit on any reasonable doubt, however it may have been engendered, and the direct proof of each element of the offense (*supra*, pp. 4-7), if

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[3] There is no real conflict between the instant case and *Hayes* v. *United States*, 227 F. 2d 540 (C. A. 10th) (see Pet. 7). In *Hayes*, the conviction was reversed on the ground of a clearly erroneous instruction (quite unlike the one given in the case at bar) on character evidence wherein the trial judge betrayed a lack of understanding of the function of reputation and character evidence by emphasizing repeatedly that the character witnesses had said nothing about the facts of the case. To the same effect as *Hayes*, see *Greer* v. *United States*, 227 F. 2d 546 (C.A. 10th).

As the Court of Appeals pointed out in the instant case (Pet. 25-26), *Holland* v. *United States*, 245 F. 2d 341, 343 (C. A. 5th), represents no more than a temporary aberration in the Fifth Circuit resulting from the overlooking of the earlier cases of *LeMore* v. *United States*, 253 Fed. 887 (C. A. 5th), certiorari denied, 248 U. S. 586; and *Grace* v. *United States*, 4 F. 2d 658 (C. A. 5th), certiorari denied, 268 U. S. 702.

[4] *Cf. United States* v. *Lowenthal*, 224 F. 2d 248, 249 (C. A. 2d); *Palacios* v. *United States*, *supra*.

believed, left no room for such a doubt. Assuming that it would have been proper to give the requested instruction in this case, the Court of Appeals was plainly right in stating (Pet. 26):

> In this record with its devastating facts, both direct and circumstantial, we would not have reached a conclusion that any such difference in the wording between the requested and given instructions could have had any harmful effect.

2. Also without merit is the argument (Pet. 8-10) that the trial judge erred in defining reasonable doubt to the jury as follows (R. 455):

> Now, gentlemen, a reasonable doubt is what the term implies, is a doubt founded upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. If, having weighed the evidence on both sides, you gentlemen reach the conclusion that the defendant or defendants are guilty to that degree of certainty that would lead you to act on the faith of it in the more important and critical affairs of your own life, you may properly convict; otherwise not.

The term "reasonable doubt" conveys its own meaning, and efforts to simplify or elucidate its meaning more fully "do not usually result in making it any clearer to the minds of the jury." *Miles* v. *United States*, 103 U. S. 304, 312; *Dunbar* v. *United States*, 156 U. S. 185, 199. Accordingly, a further definition is not ordinarily required. *Hopt* v. *Utah*, 120 U. S.

430, 440, and, when given, need not follow any fixed or inflexible formula. *Dunbar* v. *United States*, *supra*; 9 Wigmore, *Evidence* (3d ed.), Sec. 2497. An instruction is ordinarily held sufficient if the jury is given to understand that a reasonable doubt is one having a rational basis, rather than one depending merely upon whim or speculation. *United States* v. *Klock*, 210 F. 2d 215 (C. A. 2d), certiorari denied, 347 U. S. 960; *Williams* v. *United States*, 208 F. 2d 447 (C. A. 5th), certiorari denied, 347 U. S. 928; *Murphy* v. *United States*, 33 F. 2d 896 (C.A. 3d), certiorari denied, 280 U. S. 584. Measured by this standard, the trial judge's explanation of reasonable doubt in the case at bar was adequate and appropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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